

## THE POTENTIAL ABUSE OF THE SUBPOENA POWER UNDER THE INEVITABLE DISCOVERY DOCTRINE

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### INTRODUCTION

Grand jury subpoenas traditionally serve two important functions: investigatory tools for prosecutors and protections against unfounded criminal prosecutions.<sup>1</sup> In practice, a grand jury subpoena often acts as a “blank check” for federal prosecutors to investigate crimes.<sup>2</sup> As a result, subpoenas have a potentially dangerous third purpose as after-the-fact insurance policies to validate an unlawful search. The subpoena power takes on this more troublesome role when combined with the inevitable discovery exception to the exclusionary rule, which permits the introduction of evidence seized pursuant to an unlawful search if that evidence would have been “inevitably” discovered without the constitutional violation.<sup>3</sup>

This Comment will discuss the government’s potential abuse of the subpoena power in light of the inevitable discovery doctrine. In the wake of the Enron investigation and subsequent corporate scandals, white-collar criminal investigations have received increased attention and funding from federal prosecutors.<sup>4</sup> White-collar investigation is often document-heavy, and subpoenas are a common investigatory tool used by federal prosecutors.<sup>5</sup> Thus, the potential

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<sup>1</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 686–87 (1972) (“[T]he grand jury . . . has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.”); see also *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 423–25 (1983) (describing the purposes of the grand jury).

<sup>2</sup> William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 864 (2001).

<sup>3</sup> See *infra* Part I.A.

<sup>4</sup> See Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 423–24 (2007) (“With the . . . implosion of Enron . . . federal and state governments have stretched their resources to increase prosecution of white-collar crime . . . substantially increas[ing] prosecutorial . . . resources . . . [for] white-collar investigations of corporations and their executives.”).

<sup>5</sup> See J. KELLY STRADER, *UNDERSTANDING WHITE COLLAR CRIME* 14 (2d ed. 2002) (“Most of the evidence in white collar cases is not obtained by searches and seizures, but rather by

for Fourth Amendment violations in the government's abuse of the subpoena power is becoming increasingly significant. Moreover, in *Hudson v. Michigan*, the Supreme Court arguably expanded the interpretation of inevitable discovery by asking what "hypothetically could have happened had the police acted lawfully in the first place."<sup>6</sup> As a result, courts may be more willing to admit otherwise improper evidence because it could have been obtained through a grand jury subpoena. This Comment seeks to identify the most likely situations for unchecked governmental abuse of subpoenas and proposes that courts carefully apply the inevitable discovery doctrine to grand jury subpoenas.

Part I will briefly examine the development of the exclusionary rule and the inevitable discovery doctrine. The application of the inevitable discovery doctrine will be analyzed in light of *Hudson v. Michigan*, where the Court suggested a broad application of the inevitable discovery doctrine. Next, the purpose of the exclusionary rule will be contrasted with the purpose of a grand jury subpoena. This will emphasize the distinct role that the subpoena plays as an investigatory tool for federal prosecutors. Finally, this section will examine circuit courts that have specifically addressed the issue of applying the inevitable discovery exception to subpoenas. It will also explore how the Supreme Court's application of the inevitable discovery doctrine in *Hudson* may suggest how lower courts will apply the doctrine to grand jury subpoenas.

Part II will examine the recent case of *United States v. Vilar*<sup>7</sup> in the Southern District of New York. This case provides an excellent forum in which to examine the application of the inevitable discovery doctrine to grand jury subpoenas. Moreover, this case illustrates how prosecutors may potentially abuse the subpoena power without proper judicial vigilance.

Part III will divide the application of the exclusionary rule to grand jury subpoenas into three categories based on the chronology of events. Each of the categories will then be analyzed according to the likelihood that courts will apply inevitable discovery and the potential for governmental abuse. In each case, it will be assumed that an invalid search has occurred, such as a warrantless search or an

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voluntary responses to grand jury subpoenas."); see also Stuntz, *supra* note 2, at 857 ("[M]ost white-collar criminal investigations . . . involve[] the heavy use of subpoenas, not searches.").

<sup>6</sup> 547 U.S. 586, 616 (2006) (Breyer, J., dissenting).

<sup>7</sup> 530 F. Supp. 2d 616 (S.D.N.Y. 2008).

overbroad search warrant. The first category is when subpoenas are issued prior to, or concurrently with, the unconstitutional search. The second category is when subpoenas are issued after the invalid search has occurred. The final category is when an invalid search has occurred, but no subpoena has been issued. This analysis will demonstrate that, as the issuance of a subpoena moves further after the initial search, courts should be less likely to extend the inevitable discovery exception. Yet, this Comment will argue that even the first category—the chronology most similar to classic inevitable discovery and independent source doctrines—presents a dangerous situation for abuse of the subpoena power.

Part IV will suggest that courts be especially wary when the government attempts to use subpoenas as a source of inevitable discovery. In particular, courts should be more vigilant regarding the first category—when the subpoena is issued *prior* to the unconstitutional search—which is also the most likely scenario in which courts may invoke the inevitable discovery doctrine. This first chronology may seem harmless on its face, but in fact it opens the door for potential widespread abuse. If prosecutors can use their subpoena power to create a “safety net” of inevitable discovery, then police officers would be given an incentive to perform questionable, or even outright unconstitutional, searches and seizures.

## I. THE RELATIONSHIP BETWEEN THE EXCLUSIONARY RULE AND GRAND JURY SUBPOENAS

### A. *The Exclusionary Rule and the Inevitable Discovery Exception*

The exclusionary rule prohibits the introduction of evidence which was seized as a result of an unlawful search.<sup>8</sup> The exclusionary rule also prohibits the introduction of certain derivative evidence, or “fruit of the poisonous tree.”<sup>9</sup> The main justification for the rule is to deter unconstitutional police conduct and violations of the Fourth

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<sup>8</sup> The federal exclusionary rule was first adopted in *Weeks v. United States*, 232 U.S. 383 (1914). The rule was subsequently applied to the states via the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>9</sup> See *Segura v. United States*, 468 U.S. 796, 804 (1984) (“[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or ‘fruit of the poisonous tree.’” (citing *Weeks*, 232 U.S. at 383; *Nardone v. United States*, 308 U.S. 338, 341 (1939))).

Amendment.<sup>10</sup> However, the Supreme Court has recognized exceptions to the exclusionary rule when the deterrence rationale does not hold.<sup>11</sup> These exceptions include attenuation,<sup>12</sup> good faith,<sup>13</sup> and the independent source doctrine.<sup>14</sup> Such exceptions generally apply when “[i]nvolving the exclusionary rule would put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one.”<sup>15</sup>

One important exception to the exclusionary rule is “inevitable discovery,” which the Supreme Court first adopted in *Nix v. Williams*.<sup>16</sup> The inevitable discovery exception provides that tainted evidence should not be excluded “[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means” absent the illegal search.<sup>17</sup> Although it is related to the independent source doctrine,<sup>18</sup> the inevitable discovery doctrine requires the court to determine, “viewing affairs as they existed at the instant before the unlawful search, what *would have happened* had the unlawful search never occurred.”<sup>19</sup> Given the “hypothetical” nature of this determination,<sup>20</sup>

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10 See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”).

11 See *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998) (explaining that the exclusionary rule is “applicable only where its deterrence benefits outweigh its ‘substantial social costs’” (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984))).

12 The causal connection between the unlawful action and the seizure may be “so attenuated as to dissipate the taint.” *Wong Sun v. United States*, 371 U.S. 471, 487 (1963) (quoting *Nardone*, 308 U.S. at 341).

13 The exclusionary rule should not be applied when officers act in “objectively reasonable reliance on a subsequently invalidated search warrant.” *Leon*, 468 U.S. at 922.

14 The independent source doctrine permits the introduction of tainted derivative evidence if the evidence was discovered pursuant to an existing independent source, rather than the unlawful act. For further explanation, see *Murray v. United States*, 487 U.S. 533 (1988), *Segura*, 468 U.S. at 796, and *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

15 *Murray*, 487 U.S. at 541.

16 467 U.S. 431 (1984).

17 *Id.* at 444.

18 See *Murray*, 487 U.S. at 539 (“The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.”).

19 *United States v. Eng*, 971 F.2d 854, 861 (2d Cir. 1992).

20 Inevitable discovery is based on historical facts. See *Nix*, 467 U.S. at 445 n.5 (“[I]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment.”). However, the inevitable discovery exception requires applying these historical facts to a hypothetical “what if” scenario.

lower courts have applied the inevitable discovery exceptions to a wide range of situations.<sup>21</sup>

In 2006, the Supreme Court considered the scope of the inevitable discovery exception in *Hudson v. Michigan*.<sup>22</sup> *Hudson* presented the issue of whether evidence seized while performing a warranted search should be excluded given the failure of police to “knock and announce” before entering the residence, and the question presented to the Court on certiorari specifically addressed the inevitable discovery exception.<sup>23</sup> Yet, the majority opinion only referenced inevitable discovery by implication.<sup>24</sup> The Court never mentioned the term “inevitable discovery,” nor cited *Silverthorne* or *Nix*.<sup>25</sup> Justice Scalia, in one brief sentence, simply mentioned that “[w]hether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house.”<sup>26</sup> With this statement, the Court posed an almost counter-factual hypothetical to determine inevitability.

While the majority in *Hudson* offered a pithy discussion of inevitable discovery, the dissent offered a detailed critique of Scalia’s interpretation of the doctrine. Justice Breyer argued that the majority “misunderstands the inevitable discovery doctrine.”<sup>27</sup> Instead of posing a counter-factual scenario to determine inevitability, the dissent provided a definition of inevitable discovery more closely tied to the independent source doctrine. As Breyer explained, “[the inevitable discovery doctrine] does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been

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21 Courts often apply the inevitable discovery exception to inventory searches, search warrants, and searches incident to arrest. See Martin J. McMahon, Annotation, *What Circumstances Fall Within “Inevitable Discovery” Exception to Rule Precluding Admission, in Criminal Case, of Evidence Obtained in Violation of Federal Constitution*, 81 A.L.R. FED. 331, 332 (2007) (listing common inevitable discovery applications).

22 547 U.S. 586 (2005).

23 See Petition for Writ of Certiorari, *id.* (No. 04-1360), 2005 WL 856040 (presenting the question: “Does the inevitable discovery doctrine create a *per se* exception to the exclusionary rule for evidence seized after a Fourth Amendment ‘knock and announce’ violation . . . or is evidence subject to suppression after such violations . . . ?”).

24 See Chris Blair, *Hudson v. Michigan: The Supreme Court Knocks and Announces the Demise of the Exclusionary Rule*, 42 TULSA L. REV. 751, 754 (2007) (“The Court also seemed to suggest that the exclusionary rule would not apply because the evidence would have inevitably been discovered.”).

25 David J.R. Frakt, *Fruitless Poisonous Trees in a Parallel Universe: Hudson v. Michigan, Knock-and-Announce, and the Exclusionary Rule*, 34 FLA. ST. U. L. REV. 659, 714 (2007).

26 *Hudson*, 547 U.S. at 592.

27 *Id.* at 616 (Breyer, J., dissenting).

lawful.”<sup>28</sup> Rather, it “refers to discovery that did occur or that would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2) *independently* of that unlawful behavior.”<sup>29</sup>

As the dissent recognized, Scalia’s reasoning provides an exceptionally broad interpretation of the inevitable discovery exception. Notably, the majority’s interpretation ignores the traditional view of inevitable discovery, which required that the “inevitable” seizure occur independently from the unlawful event.<sup>30</sup> Instead, the majority in *Hudson* expands the applicability of inevitable discovery to counterfactual scenarios created by the court.

Professor Frakt even contends that “by relying on not what did happen, but what could have happened, *Hudson* in effect creates a whole new exception—what might be called the *parallel universe exception* to the exclusionary rule.”<sup>31</sup> Rather than create a new exception, Frakt’s “parallel universe” exception could just as easily be considered an expansion of the inevitable discovery rule. Under this new expansive inevitable discovery doctrine, “courts must ask the following question: if the same officers had conducted the same search, but doing only what they were authorized to do under the Constitution, would they have found the same evidence?”<sup>32</sup> This broad reading of the inevitable discovery doctrine, which ignores the requirement for an independent source, would allow courts to more easily apply the doctrine when presented with unlawful police conduct.

With regard to *Hudson*’s impact on the Court’s Fourth Amendment jurisprudence, “both liberal and conservative scholars consider the case a major blow to the exclusionary rule.”<sup>33</sup> In a somewhat extreme view, Professor Chris Blair suggests that the Court’s reasoning in *Hudson* signals a more general shift on the Court towards the demise of the exclusionary rule itself.<sup>34</sup> In applying *Hudson*, lower courts have recognized *Hudson*’s narrow holding that violating the

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28 *Id.*

29 *Id.*

30 *See id.* (“The inevitable discovery exception rests upon the principle that the remedial purposes of the exclusionary rule are not served by suppressing evidence discovered through a ‘later, lawful seizure’ that is ‘genuinely independent’ of an earlier, tainted one.” (citing *Murray v. United States*, 487 U.S. 533, 542 (1988))).

31 Frakt, *supra* note 25, at 715.

32 *Id.*

33 *Id.* at 661.

34 *See Blair, supra* note 24, at 751 (“The more long-range effect [of *Hudson v. Michigan*], however, may be the actual demise of the exclusionary rule itself.”).

knock-and-announce rule does not require suppression.<sup>35</sup> Yet, some courts have begun to expand *Hudson*'s narrow holding to other methods of entry used by police officers when executing a warrant.<sup>36</sup>

The long-term implications of *Hudson* on the inevitable discovery doctrine remain uncertain. Joshua Dressler notes that "the Court did not . . . expressly describe [its reasoning] as inevitable discovery" and predicts that "the implications for *Hudson* for the inevitable-discovery doctrine are fuzzy at best."<sup>37</sup> At least one court has explicitly recognized "[t]he Court's reliance on the inevitability of discovery in *Hudson*."<sup>38</sup> Other courts have implicitly recognized *Hudson*'s impact on inevitable discovery. For example, in *United States v. Hector*,<sup>39</sup> the Ninth Circuit considered whether to exclude evidence of a search because the defendant was not provided with a copy of the search warrant. Although the court did not use the term "inevitable discovery," it examined *Hudson* and reasoned that "[r]egardless of whether the police officers had actually shown Hector the search warrant, they would have executed it and recovered the drugs and firearms inside his apartment."<sup>40</sup>

On the other hand, different courts have concluded that *Hudson* involved an expansion of the attenuation doctrine, not inevitable discovery.<sup>41</sup> At least one court has explicitly denounced *Hudson*'s influence on inevitable discovery, reasoning that the "the majority opinion in *Hudson* is about causation and not about the inevitable discovery doctrine."<sup>42</sup> Thus, while the wider impact of *Hudson* on the inevitable discovery doctrine remains unclear, some courts have interpreted the case to expand the scope of inevitable discovery.

At a minimum, *Hudson* demonstrates the importance of the inevitable discovery doctrine with regard to the suppression of evidence.

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<sup>35</sup> See, e.g., *United States v. Ankeny*, 502 F.3d 829, 835 (9th Cir. 2007) ("The Court held [in *Hudson*] that violation of the knock-and-announce rule did not merit suppression of evidence found in the search . . .").

<sup>36</sup> See *id.* at 838 (holding that the use of flash-bang devices and rubber bullets upon entry into the home does not require suppression under *Hudson*); *United States v. Makki*, No. 06-20324, 2007 WL 1100453, at \*5 (E.D. Mich. Apr. 12, 2007) (finding that failure to provide defendant with the list of items to be seized upon executing the search warrant does not require suppression under *Hudson*).

<sup>37</sup> JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 32 (4th ed. Supp. 2007).

<sup>38</sup> *State v. Jackson*, 742 N.W.2d 163, 178 (Minn. 2007).

<sup>39</sup> 474 F.3d 1150 (9th Cir. 2007).

<sup>40</sup> *Id.* at 1155.

<sup>41</sup> See, e.g., *State v. Worwood*, 164 P.3d 397 (Utah 2007); *Royce v. State*, No. A05-882, 2006 WL 2347786 (Minn. Ct. App. Aug. 15, 2006).

<sup>42</sup> *State v. Callaghan*, 222 S.W.3d 610, 615 (Tex. App. 2007).

One particularly troubling application of the inevitable discovery doctrine involves the use of grand jury subpoenas. Left unchecked, the government may potentially abuse its subpoena power by creating a “safety net” to sanitize otherwise unlawful searches.

### B. *The Role of Grand Jury Subpoenas*

Rooted in Anglo-American history,<sup>43</sup> the requirement of a grand jury in the federal criminal system is firmly established in the Fifth Amendment.<sup>44</sup> The grand jury serves both an investigatory function and as a protection against unfounded government prosecution.<sup>45</sup> Thus, the grand jury acts as a “fourth branch”<sup>46</sup> of government, with a “special role in insuring fair and effective law enforcement.”<sup>47</sup> To accomplish this important task, grand juries are afforded broad investigatory powers including the ability to compel testimony.<sup>48</sup> As a result, “[t]he federal grand jury is the most powerful weapon in the prosecutor’s arsenal.”<sup>49</sup> Federal prosecutors are given broad discretion to decide when to investigate and prosecute crimes, often employing grand juries to facilitate their investigations.<sup>50</sup>

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<sup>43</sup> See *United States v. Calandra*, 414 U.S. 338, 342 (1974) (“The institution of the grand jury is deeply rooted in Anglo-American history.”); see also *Costello v. United States*, 350 U.S. 359, 362 (1956) (discussing the history of the grand jury as an English institution).

<sup>44</sup> U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .”).

<sup>45</sup> See *supra* note 1 and accompanying text.

<sup>46</sup> See John F. Decker, *Legislating Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341, 350 (2005) (“The grand jury . . . is an independent body of citizens, sometimes described as a fourth branch of the government.”); see also *United States v. Williams*, 504 U.S. 36, 47 (1992) (explaining that the grand jury “serv[es] as a kind of buffer or referee between the Government and the people”); *United States v. Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion) (“[T]he grand jury continues to function as a barrier to reckless or unfounded charges.”).

<sup>47</sup> *Calandra*, 414 U.S. at 343.

<sup>48</sup> See *id.* at 345 (“The power of a federal court to compel persons to appear and testify before a grand jury is . . . firmly established.”); *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (holding that testimony can be compelled under the Fifth Amendment).

<sup>49</sup> Anthony A. Joseph & William D. Jones III, *A Grand Jury Primer for Corporate Representation*, 63 ALA. LAW. 227, 227 (2002).

<sup>50</sup> See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (describing the discretion of federal prosecutors to bring charges before a grand jury). However, the discretion of the prosecutor is not without limitations. See James F. Holderman & Charles B. Redfern, *Pre-indictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. CRIM. L. & CRIMINOLOGY 527, 537–38 (2006) (“[A] federal prosecutor cannot use the grand jury for the sole or dominant purpose of: (1) obtaining additional evidence on charges already made against an indicted defendant, or (2) eliciting evidence for a civil case. A prosecutor also cannot use the grand jury . . . in the search for a fugitive in whose testimony the grand jury has no interest.” (footnotes omitted)).



By initiating a grand jury investigation, federal prosecutors open the door to a powerful and judicially sanctioned investigatory tool: the subpoena. The grand jury may serve a subpoena to compel testimony or the production of documents.<sup>51</sup> Although the subpoena is authorized by the court, the content of a grand jury subpoena at the time of issuance is at the discretion of the prosecutor. Unlike warrants, subpoenas are traditionally served without prior judicial approval.<sup>52</sup> Moreover, the issuance of a grand jury subpoena does not necessarily require prior grand jury approval.<sup>53</sup> As a result, the “almost limitless subpoena power” is “something akin to a blank check” for federal prosecutors.<sup>54</sup> Some limitations on the grand jury’s subpoena power do exist. For example, subpoenas may not be issued to prepare for trial, gather evidence for a civil case, intimidate a witness, or conduct an interview.<sup>55</sup> Except for these limitations, the initial decision to issue a subpoena and the subpoena’s content are at the sole discretion of the prosecutor.

Grand jury subpoenas enjoy a presumption of legitimacy.<sup>56</sup> Defendants may move to quash or modify a subpoena only “if compliance would be unreasonable or oppressive.”<sup>57</sup> For example, subpoenas may be quashed if they are overly broad, unreasonable in time frame, or not described with particularity.<sup>58</sup> However, the success rate of quashing a subpoena is predictably low.<sup>59</sup> A party seeking to quash

51 See *Wilson v. United States*, 221 U.S. 361, 372 (1911) (declaring that a subpoena *duces tecum* has the “power to compel the production of documents . . . [and] may be enforced independently of [a witness’s] testimony”).

52 See FED. R. CRIM. P. 17(a) (“The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.”).

53 See, e.g., *Lopez v. Dep’t of Justice*, 393 F.3d 1345, 1349 (D.C. Cir. 2005) (“The prosecutor may issue the subpoena without the knowledge of the grand jury, but his authority to do so is grounded in the grand jury investigation, not the prosecutor’s own inquiry.”).

54 See Stuntz, *supra* note 2, at 861, 864.

55 For further discussion on a grand jury’s limitations, see Holderman & Redfern, *supra* note 50, at 540, and Joseph & Jones, *supra* note 49, at 227.

56 See *United States v. R. Enters.*, 498 U.S. 292, 300 (1991) (“[T]he law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority.”).

57 FED. R. CRIM. P. 17(c)(2).

58 See, e.g., *United States v. Butler*, 429 F.3d 140, 149 (5th Cir. 2005) (“[A] party seeking such a subpoena must establish: (1) the subpoenaed document is relevant, (2) it is admissible, and (3) that it has been requested with adequate specificity.”).

59 See *Constitutional Rights and the Grand Jury: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 80 (2000) (statement of Andrew D. Leipold, Professor of Law, University of Illinois College of Law) (“[T]he standards for quashing a subpoena are government-friendly. . . . [T]he success rate of these motions is predictably low.”).

a subpoena based on reasonableness must overcome a high hurdle,<sup>60</sup> and it is equally difficult to quash a subpoena based on constitutional challenges.<sup>61</sup> Thus, aside from motions on the grounds of privilege,<sup>62</sup> motions to quash are rarely successful. When balancing the grand jury's need for a full investigation against the rights of individuals, courts generally prefer to give the grand jury—and thus the federal prosecutor—sweeping investigatory authority with little judicial oversight.

*C. Applying the Inevitable Discovery Doctrine to Grand Jury Subpoenas*

Historically, subpoenas have been the subject of exceptions to the exclusionary rule. In 1920, the exclusionary rule and grand jury subpoenas clashed in *Silverthorne Lumber Co. v. United States*.<sup>63</sup> In *Silverthorne*, federal agents illegally searched the business of the defendants and seized certain documents. The district court ordered that the unlawfully seized items be returned. The government, armed with the knowledge from the illegal search, then served a subpoena on the defendants to produce the same documents which had been illegally seized and returned. The Supreme Court condemned the government's two-step plan to circumvent the Fourth Amendment, holding that it "reduces the Fourth Amendment to a form of words."<sup>64</sup> Reaffirming the exclusionary rule set out in *Weeks v. United States*,<sup>65</sup> the Court proclaimed that evidence which was unlawfully seized "shall not be used at all" and cannot be the basis for a subpoena.<sup>66</sup> Although this case laid the groundwork for the independent source

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60 See *R. Enters.*, 498 U.S. at 301 (holding that when "a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation").

61 Subpoenas may also be challenged on First, Fourth, and Fifth Amendment grounds. However, the likelihood of success on these motions to quash is also low. See *United States v. Hubbell*, 530 U.S. 27, 27 (2000) (holding that the Fifth Amendment's protection against self-incrimination may apply when producing documents in compliance with a subpoena); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984) (holding that the Fourth Amendment requires a subpoena to be reasonable); *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972) (holding that the First Amendment does not absolutely protect reporters from testifying before a grand jury).

62 Subpoenas may be quashed or modified when the documents requested are privileged. See, e.g., CHARLES ALAN WRIGHT ET AL., 2 FEDERAL PRACTICE & PROCEDURE: CRIMINAL 3D § 275 (2007).

63 251 U.S. 385 (1920).

64 *Id.* at 392.

65 232 U.S. 383 (1914).

66 *Id.*

doctrine,<sup>67</sup> the Court held that in this instance “the knowledge gained by the Government’s own wrong cannot be used by it in the way proposed.”<sup>68</sup> As *Silverthorne* illustrates, the potential for abuse of the subpoena power is not a new phenomenon. Rather, the struggle between subpoenas and the exclusionary rule began almost immediately after the Court first adopted the exclusionary rule in 1914.<sup>69</sup>

Circuit courts have directly addressed the conflict between the inevitable discovery doctrine and grand jury subpoenas. In *United States v. Eng*, the Second Circuit concluded that the issuance of a subpoena may be sufficient to satisfy the inevitable discovery exception.<sup>70</sup> In *Eng*, the defendant was under investigation by the Drug Enforcement Administration and the Internal Revenue Service for narcotics and money laundering.<sup>71</sup> As part of its investigation, the government subpoenaed various bank records. After two months, the government arrested Eng and seized materials from his private safe without a warrant. Subsequently, the government subpoenaed various other bank records.

Eng moved to suppress the evidence from the safe and any derivative evidence from the subpoenas. The district court denied the motion, applying the inevitable discovery doctrine due to the pre-search subpoenas.<sup>72</sup> After remanding the case for “particularized findings,” the Second Circuit affirmed the district court’s findings and its application of the inevitable discovery doctrine.<sup>73</sup>

Importantly, the Second Circuit affirmed that subpoenas are sufficient to trigger inevitable discovery. As Anthony Girese explains, “the main thrust of [*Eng*] . . . [is that] the inevitable discovery doctrine may be applied to evidence obtained pursuant to pre- or post-illegality subpoenas, or even to evidence that would have been subpoenaed.”<sup>74</sup> In order to reach this conclusion, the court distin-

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67 See *id.* (“Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . .”).

68 *Id.*

69 See *supra* note 9 and accompanying text.

70 971 F.2d 854, 860 (2d Cir. 1992).

71 *Id.* at 856.

72 See *id.* at 864 (stating that “the challenged evidence inevitably would have been discovered”).

73 *United States v. Eng*, 997 F.2d 987, 988 (2d Cir. 1993).

74 Anthony J. Girese, *They Would Have Found It Anyway: United States v. Eng and the “Inevitable Subpoena,”* 59 BROOK. L. REV. 461, 492 (1993) (emphasis omitted).

guished a prior case, *United States v. Roberts*,<sup>75</sup> which found that an outstanding subpoena was insufficient to conclude that discovery was inevitable. By distinguishing *Roberts*, the court rejected the defendant's argument that "the subpoena power never may be relied upon by the government to meet the inevitable discovery burden of proof."<sup>76</sup> Rather, the Second Circuit opened the door for using the subpoena power as a basis for inevitable discovery:

The circumstances revealed in *Roberts*, which made it unlikely that the subpoena would produce any evidence, must be contrasted with a situation where the government can demonstrate a substantial and convincing basis for believing that the requisite information would have been obtained by subpoena. Where the government is able to make such a demonstration, there is no reason why the government may not rely upon the subpoena power as one way it might meet the burden of proving inevitable discovery by a preponderance of the evidence.<sup>77</sup>

However, the Second Circuit expressed concerns about applying the inevitable discovery exception to subpoenas, urging that "special care is required on the part of a district court when the government relies on the subpoena power."<sup>78</sup> The court required that the government show "that both issuance of the subpoena, and a response to the subpoena producing the evidence in question, were inevitable."<sup>79</sup> The Second Circuit was primarily concerned with the difference between subpoenas and search warrants, reiterating its concerns in *Roberts* that "the recipient of a subpoena may falsely claim to have lost or destroyed the documents called for, or may even deliberately conceal or destroy them after service of the subpoena."<sup>80</sup> In closing, the court warned that "subpoenas must not serve as an after the fact 'insurance policy' to 'validate' an unlawful search under the inevitable discovery doctrine."<sup>81</sup>

The Ninth Circuit has expressed similar concerns about the dangers of the subpoena power. In *Center Art Galleries—Hawaii, Inc. v. United States*,<sup>82</sup> the government served subpoenas after executing numerous warranted seizures. The district court held the warrants to be overbroad and ordered the return of the seized property. The gov-

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75 852 F.2d 671 (2d Cir. 1988) (listing instances in which a subpoena would not lead to the return of documents).

76 *Eng*, 971 F.2d at 860 (emphasis omitted).

77 *Id.*

78 *Id.*

79 *Id.*

80 *Roberts*, 852 F.2d at 676.

81 *Eng*, 971 F.2d at 861 (emphasis added).

82 875 F.2d 747, 749 (9th Cir. 1989).

ernment appealed the order, arguing that the evidence would have been inevitably discovered via the subpoenas. The Ninth Circuit rejected this argument, holding that “the [inevitable discovery] doctrine will not be applied to validate an illegal seizure when inevitable discovery is predicated upon a subpoena served to compel production of the seized items.”<sup>83</sup> The district court emphasized the potential dangers of applying the government’s subpoena power to inevitable discovery:

[T]he subpoenas were served after the search and seizure. At the time the subpoenas were served there was nothing left to discover. This leads to the inevitable conclusion that the subpoenas were used as an “insurance policy” in the event of a subsequent invalidation of the search and seizure. This should not be permitted. Such a rule would allow the government to violate the Fourth Amendment with impunity as long as they could obtain a subpoena.<sup>84</sup>

Relying heavily on the Second Circuit’s decision in *Roberts*, the Ninth Circuit also condemned the use of the subpoena as an after-the-fact “insurance policy.”<sup>85</sup> The court reasoned that:

The mere fact that the government serves a subpoena, however, does not mean that it will obtain the documents it requests. A subpoena can be invalid for a variety of reasons, as when it is unduly burdensome, when it violates the right against self-incrimination,<sup>86</sup> or when it calls for privileged documents . . . .

It is important to note that this case was decided before the Second Circuit’s rulings in *Eng*. More recently, the Ninth Circuit has approved the application of the inevitable discovery doctrine to subpoenas in some circumstances.<sup>87</sup>

Given that the long-term impact of *Hudson* on the inevitable discovery doctrine remains unclear,<sup>88</sup> *Hudson*’s impact on the application of the inevitable discovery exception to grand jury subpoenas is also unknown. Assuming arguendo that lower courts interpret *Hudson* as providing a broad interpretation of the inevitable discovery doctrine,<sup>89</sup> it follows that courts will be able to more easily apply the

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<sup>83</sup> *Id.* at 755.

<sup>84</sup> *In re Motion for Return of Property Pursuant to Rule 41*, Fed. Rules of Criminal Procedure, 681 F. Supp. 677, 687 (D. Haw. 1988).

<sup>85</sup> *Ctr. Art Galleries*, 875 F.2d at 755.

<sup>86</sup> *Id.* at 754 (citing *United States v. Roberts*, 852 F.2d 671, 675 (2d Cir. 1988)).

<sup>87</sup> *See United States v. Hazelwood*, 40 F. App’x 347, 350 (9th Cir. 2002) (affirming the application of inevitable discovery to bank records that “could readily have been obtained via subpoenas on the banks”).

<sup>88</sup> *See supra* Part I.A.

<sup>89</sup> *See supra* note 32 and accompanying text (discussing the “parallel universe” exception in *Hudson*).

doctrine in the future. Under this expanded doctrine, lower courts may be more willing to justify inevitable discovery based on a potential grand jury subpoena. Regardless, subpoenas have already been recognized by various circuit courts as a basis for inevitable discovery. Even if courts do not interpret *Hudson* as expanding the scope of inevitable discovery, it seems likely that courts will continue to rely on grand jury subpoenas to support a finding of inevitable discovery.

## II. CASE STUDY OF THE POTENTIAL DANGERS OF AN “INEVITABLE” SUBPOENA: *UNITED STATES V. VILAR*

Already a powerful investigatory tool, the subpoena becomes even more potent when combined with the inevitable discovery exception to the exclusionary rule. If left unchecked, the subpoena power may be used as an “insurance policy” to validate otherwise unlawful searches.<sup>90</sup> Given that subpoenas are issued with little judicial oversight and with few limitations, there is considerable potential for governmental abuse. This potential government abuse can take many forms. For example, knowing that the prosecutor can always “fall back” on a subpoena to declare evidence inevitably discoverable, officers may intentionally perform unlawful searches to gain evidence. Another apt example of abuse, as illustrated by the case discussed below, is that prosecutors will issue subpoenas concurrently with search warrants as “backup” plans. The potential for abuse would be magnified if lower courts interpret the inevitable discovery exception broadly under *Hudson*, often allowing subpoenas to provide a basis for “inevitability.”

A recent case illustrating the potential danger of the inevitable discovery exception is *United States v. Vilar*.<sup>91</sup> In *Vilar*, the government executed a search warrant upon the offices of Amerindo on suspicion of securities fraud and other charges. The Government seized around 170 boxes of documents and 30 computers during the search, which took around twelve hours.<sup>92</sup> While the search was being executed—and after sensitive information had already been seized—the defendant’s attorney negotiated with the Assistant United States At-

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<sup>90</sup> See *supra* note 83 and accompanying text.

<sup>91</sup> 530 F. Supp. 2d 616, 627 (S.D.N.Y. 2008) (holding that evidence recovered during a search conducted while defendant negotiated with the Government is admissible under inevitable discovery rule); see also *United States v. Vilar*, No. S305CR621KMK, 2007 WL 1075041 (S.D.N.Y. Apr. 4, 2007).

<sup>92</sup> *Vilar*, 530 F. Supp. 2d at 620.

torney (“AUSA”) to accept a grand jury subpoena if the government ceased its search.<sup>93</sup>

In subsequent proceedings, the district court partly suppressed findings from the search for violating probable cause, particularity, and reasonableness.<sup>94</sup> As a result, evidence discovered under the invalid portions of the warrant was excluded. However, “given the more relaxed relevancy requirements applied in evaluating a subpoena,” there was a “broader set of documents that could be lawfully pursued by means of the Subpoena rather than by means of the Warrant.”<sup>95</sup> This “created a category of documents that . . . were illegally seized from Amerindo’s office pursuant to . . . the Warrant, [but] fell within the scope . . . of the Subpoena.”<sup>96</sup>

The government argued that the challenged documents should be admissible based on the inevitable discovery and independent source exceptions to the exclusionary rule. Put simply, the government contended that the documents would have inevitably been discovered via the subpoena, regardless of the invalid portions of the search warrant. The district court agreed, holding that the documents were admissible under the inevitable discovery doctrine.<sup>97</sup> The court declined to accept the defendant’s argument that the unlawful search itself—and thus the subsequent discussion between the defense attorney and the AUSA—triggered the subpoena.

Relying on the Second Circuit’s opinion in *Eng*,<sup>98</sup> the district court applied the inevitable discovery exception to the subpoena. The district court looked to four factors. First, the court found that the subpoena “was not issued on the basis of information unlawfully gained from Amerindo.”<sup>99</sup> In other words, there was “no concern that, in determining the contents of the Subpoena, the Government relied upon *information* obtained during the course of the initial search.”<sup>100</sup> Second, the government “established by a preponderance of the evidence that the Subpoena was the product of an ‘active and ongoing investigation’ into suspected wrongdoing by Defendants.”<sup>101</sup> Third, the court found that “absent the invalid portions of the War-

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93 *Id.*

94 *Id.*

95 *Id.* (internal quotation marks omitted).

96 *Id.* These documents are referred to as the “Challenged Documents.”

97 *Id.* at 632.

98 *See supra* note 9 and accompanying text.

99 *Vilar*, 530 F. Supp. 2d at 627.

100 *Id.*

101 *Id.*

rant, . . . the Government would have inevitably issued the Subpoena” after speaking with the defense attorney.<sup>102</sup> Specifically, the court reasoned that the *invalid portions* of the warrant did not prompt the defense attorney’s discussion with the AUSA.<sup>103</sup> Fourth, the government established that “(1) [d]efendants would have inevitably produced the Challenged Documents in response to the Subpoena, and (2) none of the concerns listed in *Roberts* [such as lost, concealed, or destroyed documents] would have presented an obstacle to the discovery of the Challenged Documents.”<sup>104</sup> As support for this last finding, the court relied on instances when “[d]efendants repeatedly and unambiguously stated their intention to cooperate with the Government’s lawful requests for documents.”<sup>105</sup>

*Vilar* illustrates an ideal scenario with the potential for government abuse. The defendants in *Vilar* recognized such dangers, arguing that the subpoena was an “insurance policy” to validate the overbroad warrant. The trial court disagreed, finding that “the Government issued the Subpoena not to cure any defects in the Warrant, but to provide an added incentive to Amerindo to provide the sought-after materials.”<sup>106</sup> Consequently, the court “rejected Defendants’ assertion that the Government ‘viewed the Subpoena as some sort of an insurance policy against a shaky warrant.’”<sup>107</sup> Nevertheless, *Vilar* is an excellent example of a situation in which the government may abuse its subpoena power as a contingency plan for questionable warrants. Even if the government does not intentionally act to circumvent the Fourth Amendment, *Vilar* demonstrates the power of the inevitable discovery exception, if interpreted too broadly, to bypass protections against unreasonable searches or seizures.

### III. INEVITABILITY OF ISSUANCE AND INEVITABILITY OF COMPLIANCE: THREE CHRONOLOGICAL SCENARIOS OF ILLEGAL SEARCHES AND SUBPOENAS

In the context of an unlawful search, the determination of whether a subpoena is sufficient to trigger the inevitable discovery exception can be separated into two elements: inevitability of issu-

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102 *Id.* at 628.

103 *Id.* at 629.

104 *Id.* at 631.

105 *Id.*

106 *Id.* at 630 (internal quotation marks omitted).

107 *Id.*



ance and inevitability of production.<sup>108</sup> Both elements are necessary to prove inevitable discovery. “Inevitability of issuance” can be defined as whether a subpoena would have been inevitably issued but for the unlawful search. This first inquiry asks what the *government* would have done absent the unlawful conduct. “Inevitability of production” (or compliance) is whether the evidence would have been inevitably produced by the subpoenaed party. This second inquiry involves predicting the *defendant’s* response absent the unlawful event. Using *Vilar* as an example, elements one through three in the *Vilar* test determine inevitability of issuance by questioning what information the government relied upon and predicting how the government would have acted. On the other hand, element four in the *Vilar* test asks, almost verbatim, whether documents would have been inevitably produced by the defendant.<sup>109</sup>

In order to determine that evidence would have been inevitably discovered, both the requirements of inevitable “issuance” and “production” must be satisfied. As the Second Circuit recognized in *Eng*, “the government must show that both issuance of the subpoena, and a response to the subpoena producing the evidence in question, were inevitable.”<sup>110</sup> Anthony Girese considers this dual requirement to be the “key safeguard for the exclusionary rule.”<sup>111</sup> Notably, the difficulty in satisfying these two elements depends upon the facts in each case. Some factors the court may consider include the nature of the subpoena’s target and the scope of the investigation.<sup>112</sup> Another important question to consider is at what point in the investigation the subpoena was issued, if one was issued at all. To answer this vital question, the court must carefully evaluate the chronological sequence of events.

Assuming the existence of an unlawful search, three chronological scenarios emerge in which a court could rely on a grand jury subpoena to invoke the inevitable discovery exception. In the first instance, a subpoena is issued prior to the unlawful search. This situation most closely resembles the traditional independent source rationale and is most likely to trigger inevitable discovery. In the second instance, a subpoena is issued concurrently with the illegal

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<sup>108</sup> See Girese, *supra* note 74, at 498.

<sup>109</sup> See *Vilar*, 530 F. Supp. 2d at 627 (explaining that the government is required to establish by a preponderance of the evidence that the challenged documents would have been inevitably discovered without relying upon the unlawfully gained information).

<sup>110</sup> *United States v. Eng*, 971 F.2d 854, 860 (2d Cir. 1992).

<sup>111</sup> Girese, *supra* note 74, at 496–98.

<sup>112</sup> See *id.* at 499–500.

search or soon thereafter. When the subpoena is issued after the search, it becomes more difficult to demonstrate inevitability, because the subpoena may be based on evidence which was unlawfully obtained. Moreover, this scenario often calls the motivations of the government into question, and the court may very well suspect that the subpoena is being utilized as a “backup plan” to the seemingly unlawful search. In the third instance, an unlawful search occurred, but no subpoena is issued. This is the most difficult scenario for the government to demonstrate inevitable discovery. In all three of these scenarios, courts must be aware of the subpoena’s potential for abuse when applying the inevitable discovery exception.

*A. Scenario 1: Issuance of a Subpoena Prior to the Unlawful Search*

Of the three scenarios presented, the issuance of a subpoena prior to the unlawful search is the most likely to implicate the inevitable discovery exception. In this situation, the subpoena is issued prior to the unlawful search, so there is no fear that the issuance of the subpoena was tainted by the unlawful act. Thus, it can easily be demonstrated that the subpoena was inevitably issued. The most significant problem with demonstrating inevitability in this instance is proving inevitable production. In other words, the court cannot simply assume that the target of a subpoena will produce all of the documents requested in the subpoena. As the Second Circuit recognized in *Roberts*, the target of a subpoena can destroy or conceal the requested records.<sup>113</sup> As a result, the court will need to examine the facts in each case to determine whether the party would have produced the requested documents. For example, in *Vilar*, the court looked to statements by the defendant and his attorney which promised compliance with the subpoena.<sup>114</sup>

Putting aside the difficulty of demonstrating the inevitability of production, subpoenas issued prior to the unlawful search most closely fit the traditional application of inevitable discovery. The existence of a prior independent source—the prior subpoena—resembles the facts in *Nix*, where a search party began looking for the victim’s body prior to the unlawful confession.<sup>115</sup> Given that the

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<sup>113</sup> See *United States v. Roberts*, 852 F.2d 671, 676 (2d Cir. 1988).

<sup>114</sup> See *Vilar*, 530 F. Supp. 2d at 631.

<sup>115</sup> See *Nix v. Williams*, 467 U.S. 431, 449–50 (1984) (“On this record it is clear that the search parties were approaching the actual location of the body, and . . . that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found.”).

Court's acceptance of the inevitable discovery exception in *Nix* was supported as an extension of the independent source doctrine,<sup>116</sup> the presence of a prior subpoena would present a strong case for its application. Thus, courts would be most likely to invoke the inevitable discovery doctrine in this first scenario, when a subpoena is issued prior to the unlawful police conduct.

In addition, this first scenario search appears to have the least potential for abuse. In this case, the government's use of the subpoena power seems to conform to its intended purpose as an investigatory tool. For example, with the knowledge gained from a suspect's responses to a subpoena, the government may establish the necessary probable cause to serve a valid search warrant on the suspect. Without the knowledge that its future search would be declared invalid, the government's motive regarding the initial subpoena appears to be genuine.

However, it is still possible that a prosecutor may think strategically and issue the prior subpoena as an "insurance policy." Consequently, while this first scenario appears on its face to have minimal potential for abuse, the actual potential for governmental misconduct is enormous. In response, courts should be as wary of applying inevitable discovery to a prior subpoena as they may be in other situations. Specifically, courts must scrutinize the facts to determine whether production of the subpoenaed documents was inevitable. When in doubt, courts should err on the side of caution and assume that questionable documents may have been lost or that a party may have refused to produce them.

*B. Scenario 2: Issuance of a Subpoena Concurrently With or After the Unlawful Search*

When the subpoena is issued after the unlawful search, courts will be less likely to invoke the inevitable discovery exception. In addition to the usual problems associated with the inevitability of production, this scenario also begins to question the inevitability of issuance, because a subpoena may have been issued based on information which was unlawfully obtained. As the Second Circuit recognized, "the Government must establish that the investigation was not 'trigger[ed]' . . . by the information unlawfully gained by the illegal

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<sup>116</sup> See *id.* at 443–44 (noting the functional similarity between the independent source doctrine and the inevitable discovery exception).

search.”<sup>117</sup> For example, the first factor in the *Vilar* test was that “the Subpoena was issued independently of any information obtained by means of the unlawful portions of the Warrant.”<sup>118</sup> Thus, at least some courts have recognized the uncertainty regarding the inevitability of issuance in this scenario. As a result, a subpoena issued after an unlawful search receives more scrutiny from the court and is less likely to invoke the inevitable discovery exception.

Moreover, the potential for governmental abuse greatly increases when subpoenas are issued concurrently with, or after, an unlawful search. This second scenario often calls the government’s motives into question. In these cases, the issuance of subpoenas begins to look like the dreaded “insurance policy” criticized by the Second and Ninth Circuits.<sup>119</sup> Within this scenario, two problematic series of events may occur.

In the first series of events, the government issues a subpoena after the unlawful search but before a court rules upon the admissibility of the evidence. In this instance, the government would not yet know whether its search will be upheld upon a motion to suppress. The “worst case” scenario is as follows: worried that the fruits of its search may eventually be suppressed, the government issues subpoenas for the same evidence discovered in the search. Although this disingenuous motive will not be true in all cases, this sequence of events should signal caution when courts evaluate arguments of inevitable discovery. As the Second Circuit recognized in *Eng*, “[p]articular care is appropriate where . . . subpoenas are issued after or at the time of the unlawful search . . . .”<sup>120</sup> While the most questionable subpoenas in *Eng* were issued after the unlawful search, troublesome subpoenas may also be issued concurrently with an unlawful search.<sup>121</sup>

In the second series of events, the government issues a subpoena after a search has already been declared unlawful or invalid by the court. In this instance, the government’s motives are more transparent, and case law demonstrates that this obvious attempt to circumvent the Fourth Amendment would not likely be upheld. As the Supreme Court made clear in *Silverthorne*, the government cannot perform an illegal search, have the documents suppressed, and then

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117 *Vilar*, 530 F. Supp. 2d at 625 (alteration in original) (quoting *United States v. Eng*, 971 F.2d 854, 871 (2d Cir. 1992)).

118 *Id.* at 634.

119 *Eng*, 971 F.2d at 861 (quoting *Ctr. Art Galleries v. United States*, 875 F.2d 747, 755 (9th Cir. 1989)).

120 *Id.* at 860.

121 *See supra* Part II (discussing *Vilar*, 530 F. Supp. 2d at 616).

subpoena the identical documents.<sup>122</sup> The Court held that such an action “reduces the Fourth Amendment to a form of words” because “[t]he essence of a provision forbidding the acquisition of evidence in a certain way is . . . not merely . . . [that the evidence] shall not be used before the Court but that it *shall not be used at all*.”<sup>123</sup> Consistent with *Silverthorne*, courts are unlikely to accept an argument of inevitable discovery when the requested documents have already been suppressed prior to the issuance of a subpoena.

*C. Scenario 3: Unlawful Search Without the Issuance of a Subpoena*

In the third scenario, the government attempts to rely on the inevitable discovery exception after a search has been declared unlawful, even though no subpoena has been issued. This is the least likely scenario for invoking the inevitable discovery exception, because the government must overcome significant hurdles to demonstrate both inevitability of issuance and inevitability of production. Here, the question of issuance becomes central, since prosecutors are arguing that although no subpoena was issued, the government would have hypothetically (and inevitably) issued a subpoena absent the unlawful search. In the prior scenarios, the government must simply demonstrate that it would have acted *similarly* (by issuing a subpoena) absent the unlawful event. However, in this final scenario the government must prove that it would have acted *differently* (and actually issued a subpoena) but-for the unlawful search.

The Second Circuit opened the possibility of this third scenario in *Eng*. On remand, the district court noted that “the presence or absence of a post-search subpoena is irrelevant to the question of whether the government inevitably would have discovered the evidence absent the primary illegality.”<sup>124</sup> The court recognized that “*actual* issuance [of a subpoena] is not a prerequisite for the application of the inevitable discovery doctrine. Sufficient proof that such subpoenas *would* have issued will demonstrate inevitability.”<sup>125</sup> Upon opening the door to an inevitable subpoena, the Second Circuit also recognized that “special care is required on the part of a district court when the government relies on the subpoena power.”<sup>126</sup> In addition

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<sup>122</sup> See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391–92 (1920) (holding that evidence gathered from the subpoena must be excluded).

<sup>123</sup> *Id.* at 392 (emphasis added).

<sup>124</sup> *United States v. Eng*, 819 F. Supp. 1198, 1224 (E.D.N.Y. 1993).

<sup>125</sup> Girese, *supra* note 74, at 502.

<sup>126</sup> *United States v. Eng*, 971 F.2d 854, 860 (2d Cir. 1992).

to requiring proof of both issuance and production, the Court insisted on “a substantial degree of directness in the government’s chain of discovery argument, rather than a hypothesized ‘leapfrogging’ . . . until the piece of evidence is reached.”<sup>127</sup> This Second Circuit test applies to all three chronological scenarios, but the test makes it most difficult to prove inevitable discovery in cases where no subpoena had been issued.

Although proving “inevitable issuance” in this scenario is a daunting task, it is not impossible. In fact, proving the inevitable issuance of a subpoena may be easier than proving the inevitable issuance of a warrant.<sup>128</sup> To prove the “inevitable” issuance of a warrant, the government would need to demonstrate that a neutral magistrate would have approved the warrant application upon a showing of sufficient probable cause.<sup>129</sup> Yet, since subpoenas are issued at the discretion of prosecutors with little judicial oversight,<sup>130</sup> such a showing is unnecessary to demonstrate the inevitability of issuance concerning subpoenas. Nevertheless, demonstrating both issuance and production when no subpoena had been issued is a difficult task. Consequently, courts are least likely to apply inevitable discovery in this third scenario.

In addition, this scenario presents the most troubling situation for abuse of the subpoena power.<sup>131</sup> Without the need to have a pre-existing or even a post-search subpoena, this argument can be made in many more cases. If courts accept this argument with regularity, prosecutors will be able to introduce tainted evidence with relative ease, essentially bypassing the warrant requirement of the Fourth Amendment.<sup>132</sup> Moreover, contrary to the purposes of the exclusionary rule,<sup>133</sup> this may incentivize police officers to perform unlawful searches and seizures, knowing that such violations can easily be

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127 *Id.*

128 *See Girese, supra* note 74, at 493 (distinguishing the “inevitable subpoena” from the “inevitable warrant”).

129 *See Murray v. United States*, 487 U.S. 533, 540 (1988).

130 *See supra* Part I.B.

131 *See id.* (expressing uneasiness about the Second Circuit’s acceptance of the “inevitable subpoena” argument in *Eng*).

132 U.S. CONST. amend. IV (“The right of the people . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .”).

133 *See United States v. Calandra*, 414 U.S. 338, 348 (6th Cir. 1974) (clarifying that the purpose of the exclusionary rule is to deter unlawful police behavior).

cured. Thus, frequent acceptance of this third scenario has the potential to warp the exclusionary rule itself.<sup>134</sup>

#### IV. CLOSE JUDICIAL SCRUTINY AND CASE-BY-CASE ANALYSIS IS REQUIRED TO AVOID GOVERNMENTAL ABUSE OF THE SUBPOENA POWER

The Second Circuit test in *Eng* is an excellent example of how courts should scrutinize grand jury subpoenas in the context of inevitable discovery. Most importantly, courts should follow *Eng*'s dual inevitability requirement by demanding that the government prove both "inevitability of issuance" and "inevitability of production." Moreover, determining whether the government meets each requirement involves a careful case-by-case analysis. Among the many factors that the court should consider, the chronological sequence of events—specifically when the subpoena was issued—should be a key element in the analysis. As evidenced by the three chronological scenarios, the likelihood of courts applying the inevitable discovery exception should be reduced as the issuance of the subpoena moves further after the unlawful event. At the same time, the potential for abuse of the subpoena power becomes greater as issuance moves further from the unlawful search. This sliding scale, if applied properly, would strike a delicate balance between allowing exceptions to the exclusionary rule, while still preserving the rule's purpose of deterring unlawful police behavior.

At first glance, the Second Circuit test appears to have adequately protected individuals from potential governmental abuse of the subpoena power. However, it is important to recognize that courts must always be wary when invoking the inevitable discovery rule based on subpoenas. Notably, judicial vigilance is equally necessary in the first chronological scenario, even though the government's motives may appear to be genuine. As subpoenas become a more widely used tool by prosecutors in white collar investigations, even this first scenario has the potential for abuse. If police officers learn that a prior subpoena signals a "green light" for unlawful searches, this may encourage the exact police behavior that the exclusionary rule is meant to deter.

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<sup>134</sup> Regular acceptance of any of the exclusionary rule exceptions may also warp the exclusionary rule. However, this third scenario could be used most frequently, since it does not require the issuance of a subpoena at all. Therefore, the dangers of this scenario are more pronounced than in other circumstances.

In order to prevent this scenario, courts must carefully examine the motives of the government when invoking the inevitable discovery argument based on a prior subpoena. This examination is necessary for all three chronological scenarios, but may often be overlooked in the context of prior subpoenas. Although prior subpoenas generally serve important investigatory functions, these subpoenas may still act as an “insurance policy” against unlawful searches if left unchecked.

When a subpoena has been issued, courts should carefully evaluate subpoenas to determine the subpoena’s boundaries and scope. Unlike warrants, which usually require the court to review the scope of the warrant prior to its issuance, courts have little influence on the scope of subpoenas when they are initially issued. As a result, courts should carefully consider the scope of subpoenas—exactly what documents the subpoenas requested and how specifically they requested those documents—to determine the inevitability of production. Only when the subpoena is sufficiently detailed should a court determine that compliance with the subpoena would have been inevitable. Moreover, courts should examine the egregiousness of the unlawful search. By examining the context surrounding the unlawful search, the court can also infer the government’s motives in issuing the subpoena. Courts should favor subpoenas which are used as investigatory tools over subpoenas designed to bypass Fourth Amendment protections regarding searches.

Regardless of when a subpoena is issued (if one has been issued at all), courts must always bear in mind that the target of subpoenas will not always fully comply with the government’s requests. Although courts may want to believe that all law-abiding citizens will produce the requested documents, this assumption would not properly reflect the dynamics of a grand jury investigation.<sup>135</sup> Rather, unless the government can point to specific facts demonstrating a likelihood of compliance, courts should err on the side of caution concerning the inevitability of production. For example, in *Vilar* the court relied upon statements made by the defendant and his attorney promising that the defendant would produce the requested documents.<sup>136</sup> Al-

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<sup>135</sup> See *supra* note 80 and accompanying text (describing concerns in *United States v. Roberts*, 852 F.2d 671 (2d Cir. 1988)).

<sup>136</sup> *United States v. Vilar*, 530 F. Supp. 2d 161, 631 (S.D.N.Y. 2008) (“[T]he Government has pointed to multiple instances—both before, during, and after the Government’s search of Amerindo’s office—wherein . . . Defendants repeatedly and unambiguously stated their intention to cooperate with the Government’s lawful requests for documents in this case.”).



though one could easily question whether such statements are sufficient proof of “inevitable compliance,” such an inquiry is vital to demonstrate inevitable discovery. If courts fail to question whether issuance and production are both inevitable, then courts will fail to protect individuals from the potential abuse of the subpoena power.

With proper judicial oversight, subpoenas can act as the source of inevitable discovery without distorting the purpose of the exclusionary rule. At its core, the exclusionary rule is designed to discourage unlawful police behavior. Only when the exceptions to the rule begin to encourage unlawful police behavior—such as searching without a proper warrant—do the exceptions run the risk of swallowing the rule altogether.<sup>137</sup> Due to the relative ease of obtaining subpoenas and their prevalence as an investigatory tool, such fears are more pronounced in the context of subpoenas. These fears are magnified by the Supreme Court’s arguably broad interpretation of inevitable discovery in *Hudson*. However, such fears need not be realized. Careful judicial scrutiny should be applied in all three chronological scenarios, limiting the frequency with which inevitable discovery is invoked based on grand jury subpoenas.

#### CONCLUSION

Although the subpoena power has the potential for government abuse when used in connection with the inevitable discovery doctrine, careful attention by courts to both “inevitable issuance” and “inevitable production” can thwart such abuse. Three chronological scenarios exist when invoking the inevitable discovery exception based upon grand jury subpoenas: (1) prior issued subpoenas; (2) subsequently or concurrently issued subpoenas; and (3) non-issued subpoenas. While the last two scenarios have the most potential for abuse, the first scenario is equally dangerous and also requires heightened judicial scrutiny. Courts must carefully evaluate both the scope of the subpoena and the motives behind the government’s issuance of the subpoena. By limiting the application of inevitable discovery in the context of subpoenas, courts can maintain the integrity of the exclusionary rule.

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<sup>137</sup> *United States v. Eng*, 971 F.2d 854, 860 (2d Cir. 1992) (recognizing “the need to prevent the inevitable discovery exception from swallowing the exclusionary rule”).